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No. 02-1643

Supreme Court, U.S.
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In The

Supreme Court of the United States

GARY EBECK,

Petitioner,

v.

BILL HEDRICK, Warden, United States Medical Center for Federal Prisoners,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Mr. Ebeck's claim differs from the vast majority of post-conviction claims because of one central fact: As the government now admits, the sentencing court lacked subject matter jurisdiction. Simultaneously, it is this same fact that makes Mr. Ebeck factually innocent of federal kidnaping as defined by 18 U.S.C. § 1201(a)(2).

It is well established that the parties cannot waive a jurisdictional defect of a sentencing court. Because federal courts, particularly lower federal courts, are courts of limited jurisdiction, they must be assured that their actions fall within the limited scope of powers granted under Article III of the United States Constitution. *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). The parties are incapable of conferring jurisdiction upon the court by waiver or procedural default. *Id.* Jurisdictional claims may not be waived or defaulted since they form the basis of the court's power to act, and, therefore, a petitioner need not show "cause" to justify his failure to raise such a claim. *Id.* Even where a petitioner fails to object to the court's lack of jurisdiction at trial *or on appeal*, there is no requirement to show cause and prejudice at the time when the jurisdictional error becomes evident. *Id.* (emphasis added).

In *Harris*, the prosecutor failed to follow the proper steps necessary to confer jurisdiction upon the court to enhance the defendant's sentence due to the existence of prior convictions. *Id.* at 1306. Consequently, the court's decision to proceed with the defendant's guilty plea and to enhance the sentence without the necessary pleadings rendered the court's sentence a nullity. On appeal, the

Eleventh Circuit held that strict compliance with jurisdictional requirements was mandatory and that any sentence imposed by the court was improper. *Id.* at 1309. The court emphasized that jurisdictional elements were not subject to waiver *or procedural default* and that the court had no power to render the decision that it did. *Id.* (emphasis added). The fact that the defendant failed to raise the jurisdictional issue at trial or in his direct appeal did not bar review by the court because a court's lack of jurisdiction is not subject to waiver or forfeiture. *Id.*

Harris's jurisdictional claim was raised by collateral attack in a § 2255 motion. The government argued that such an attack must be supported by the two-pronged showing of cause of prejudice when the issue is not appropriately raised by objection at trial. *Id.* at 1307. However, the Eleventh Circuit, in its reversal and remand of petitioner's appeal from the denial of his § 2255 petition, emphasized that errors of constitutional proportion such as jurisdiction and the court's power to render judgment are ones that should not be subjected to the normal "cause" and "prejudice" standards because they are ones that cannot be defaulted. *Id.* at 1308. The court cannot derive power from the acts of parties to the case, either by consent or by default. *Id.*

The court found the jurisdictional claim to be so compelling that it suspended the normal requirements and moved to the issue of jurisdiction based upon its independent obligation to assure itself of proper subject matter jurisdiction. *Id.* at 1308. Finding that the court lacked jurisdiction, the court of appeals reversed the sentence and remanded for re-sentencing. *Id.* at 1309.

The *Harris* court cited similar authority in the Seventh Circuit, noting *Kelly v. United States*, 29 F.3d 1107 (7th Cir. 1994), for the same proposition. Normally, the *Kelly* court noted, "[t]he point of [requiring a petitioner to show] cause and prejudice, we repeat, is to overcome the waiver. But this analysis of course assumes that the error in question is a waivable one. And *jurisdictional defects are not*." *Id.* at 1112 (emphasis added).

A court at any stage can raise the issue of lack of subject matter jurisdiction *sua sponte*. This rule is "inflexible and without exception" and requires a court "to deny its jurisdiction and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guiinee*, 456 U.S. 694, 702 (1982). "A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking*." *Id.* at 1251 (emphasis added).

"Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, *inaction*, or stipulation." *Id.* at 1251 (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)) (emphasis added). This review is particularly important where the situs of the offense is an element of the crime. *See United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994).

In reality, Mr. Ebeck's claim that the court lacked subject matter jurisdiction is even more compelling than that presented in *Harris*. In the case at bar, the United States did not have exclusive or concurrent jurisdiction over the site of the alleged crime. Mr. Ebeck would respectfully

note that neither the government nor any court before which Mr. Ebeck entered his plea of guilty, has inquired into the jurisdictional issue. In short, a specific statutory element is missing: The crime must be committed on land within the criminal jurisdiction of the United States. This fact, standing alone, should warrant Mr. Ebeck an opportunity to file a petition pursuant to § 2241 so that the merits of his claim can be evaluated and determine what appropriate relief is due to Mr. Ebeck.

In its Brief in Opposition, the Government cites to language in § 2241 which authorizes a federal court to issue a writ of habeas corpus to federal or state prisoners who are in custody in violation of the Constitution or laws or treaties of the United States. Mr. Ebeck's conviction and sentencing resulted in violations of his constitutional rights under the Due Process Clause of the Fifth Amendment in that he is actually innocent of the specific federal offense for which he pled guilty. This further supports Mr. Ebeck's argument that 28 U.S.C. § 2241 is an appropriate avenue of relief. His claim is an example of the circumstance for which the court's equitable powers under the miscarriage of justice rule should be invoked to permit petitioner to prove his factual innocence.

According to the dictates of the habeas corpus statutes, a court is directed to determine the facts and to "dispose of the matter as law and *justice* require." 28 U.S.C. § 2243 (emphasis added). "The character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition." *Murray v. Carrier*, 477 U.S. 478, 498 (1986). This Court has continually affirmed this principle and held that a petitioner who can demonstrate his factual innocence can overcome procedural defaults because the unjust and wrongful detention of one

who is actually innocent of the crime for which he is incarcerated constitutes a fundamental miscarriage of justice. *Bousley v. United States*, 523 U.S. 614, 623. *See also Murray v. Carrier*, supra; *Bunkley v. Florida*, 123 S. Ct. 2020, 2023 (2003). (This Court held that when a defendant did not meet a statutory requirement to be found guilty, the conviction did not satisfy the strictures of the Due Process Clause.)

In *Bousley*, the petitioner encountered procedural hurdles in that he attempted to raise certain issues on collateral attack that were not first addressed on direct appeal. *Id.* at 621. The petitioner failed to raise the issue of his involuntary and unintelligent guilty plea which was procured due to erroneous advice regarding the proper interpretation of the "use" prong of 18 U.S.C. § 924(c). *Id.* This Court held that "although th[e] claim was procedurally defaulted, petitioner may be entitled to a hearing on the merits of it if he makes the necessary showing of actual innocence to relieve the default." *Id.*

Similarly, in *Murray v. Carrier*, this Court emphasized the federal court's habeas power to look past ordinary procedural requirements in the extraordinary case where a constitutional error has probably resulted in the conviction of one who is actually innocent. *Id.* (where this Court reversed the Court of Appeals' determination that petitioner had properly shown the requisite "cause" and "prejudice" to overcome procedural default, but permitting petitioner an opportunity to prove his claim of "actual innocence"). The doctrine of a court's "equitable discretion" should prevail and permit at least some court to reach the merits of the petitioner's claim when one is actually innocent of a charge and is being held in the custody of the federal government. *Id.* There are appropriate cases where "the principles of comity and finality that inform the

concepts of cause and prejudice 'must yield to the imperative of correcting fundamentally unjust incarceration.'" *Id.* at 495. "Convictions [ ] totally devoid of evidentiary support violate due process." *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

In *Murray,* Justice Stevens opined that there must be a searching consideration of the petitioner's claim and an "overall inquiry into justice." *Id.* at 515. He further noted that "it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice." *Id.* at 495. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). At times, procedural standards must yield to "the imperative of correcting a fundamentally unjust incarceration." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

In *Triestman v. United States*, the Eleventh Circuit Court of Appeals specifically addressed whether a claim of actual innocence satisfied a petitioner's burden of showing that 28 U.S.C. § 2255 was "inadequate and ineffective." The court noted that, in regard to the gatekeeping requirement, "courts have yet to articulate the scope and meaning of 'inadequate and ineffective.'" *Triestman v. United States*, 124 F.3d 361, 377 (11th Cir. 1997). The court held that the scope and meaning of "inadequate and ineffective" is, "at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." *Id.*

In reaching its conclusion, the Eleventh Circuit quoted this Court's opinion in *Medina v. California*, 505 U.S. 437, 445 (1992) that "a procedural limitation 'is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* The question posed before this Court would further define the limits of the lower courts in exercising their power authorized by 28 U.S.C. § 2241.

In its Brief in Opposition, the Government focused primarily on Mr. Ebeck's failure to raise his claim in the filing of his first § 2255. However, the facts of Mr. Ebeck's case are unusual as the claim is based on the sentencing court's lack of subject matter jurisdiction. This distinction is crucial. *Murray* and *Bousley*, both cases from this Court, stand for a fundamental premise that surpasses the strictures of procedure: A person should not be allowed to remain incarcerated when it is apparent from the record that the sentencing court never had subject matter jurisdiction. It is for this proposition that Mr. Ebeck cited *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) and *Calcano-Martinez v. Immigration and Naturalization Service*, 533 U.S. 348 (2001).

Mr. Ebeck has claimed that he is factually innocent of the crime. The lower court did not grant his petition pursuant to § 2241, finding that his claim was one of legal insufficiency, rather than one of actual innocence. On this basis, the lower court treated Mr. Ebeck's petition as one that was actually a "second" or "successive" § 2255 petition. Therefore, Mr. Ebeck was denied relief. The merits of this issue are also important, in that had the court found Mr. Ebeck's claim one of factual innocence, the court could have allowed him to rely on § 2241 as an avenue of relief.

Proper subject matter jurisdiction as granted by Article III of the United States Constitution is so fundamental that it can never be waived. Section 2241 was enacted so that petitioners can obtain relief when they suffer from an egregious constitutional injustice. The sentencing court in Mr. Ebeck's case did not have subject matter jurisdiction, thereby making his detention illegal, not only because it was imposed by the court without authority, but also because it renders him factually innocent of federal kidnaping as charged.

CONCLUSION

Mr. Ebeck's claim is based on the fact that he is factually innocent of federal kidnaping as defined by 18 U.S.C. § 1201(a)(2). Because subject matter jurisdiction cannot be procedurally defaulted, Mr. Ebeck should be allowed to bring his claim pursuant to 28 U.S.C. § 2241. Mr. Ebeck respectfully requests that this Court grant his Petition for Writ of Certiorari. Mr. Ebeck would also respectfully request that this Court reverse the decision of the Eighth Circuit and remand with directions to permit him to proceed with his claim through a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

Respectfully submitted,

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